No. 22422

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. CUNNINGHAM,

Appellant,

vs.

LITTON INDUSTRIES,

Appellee.

BRIEF FOR THE APPELLEE LITTON INDUSTRIES, INC., A CORPORATION.

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Jurisdiction.

This is an appeal taken from an order of District Court dismissing plaintiff's complaint without leave to amend. Jurisdiction of the District Court is conferred by 42 U.S.C. Section 2000(e)-5(f), and this Court has jurisdiction under 42 U.S.C. Section 2000(e)-5(j) and 28 U.S.C. Section 1291.

Counterstatement of the Case.

In her complaint, Appellant alleges that in April, 1966, and October 7, 1966, she was unlawfully refused a promotion solely because of her sex [Clk. Tr. p. 4, lines 1-19]. She thereafter filed a charge with the Equal Employment Opportunity Division* of the Equal Opportunity Commission, alleging discriminatory prac-

*Hereinafter referred to as E.E.O.C. or as the "Commission".

tices. On March 30, 1967, following a finding of probable cause by the Commission, compliance proceedings were held by the Commission and Appellee. On June 7, 1967, Appellant was informed that efforts to secure voluntary compliance had failed [Clk. Tr. p. 4, line 21, to p. 5, line 11]. On July 6, 1967, Appellant filed her complaint herein.

Proceedings in the District Court.

Upon Motion to Dismiss made by Appellee, the District Court made its Order Dismissing the Complaint Without Leave to Amend on the ground that "the maximum time (for filing a complaint under 42 U.S.C. 2000(e)-5) is 180 days from the date of the claimed act of discrimination" [Clk. Tr. p. 21, lines 21-23].

Issue on Appeal.

Under 42 U.S.C. 2000(e)-5, is the maximum time for filing a civil action 180 days from the date of the claimed act of discrimination or at any time that is within 30 days after the claimant receives notification from the Commission that efforts to secure voluntary compliance or conciliation have failed?

ARGUMENT.

I.

Appellant Has Failed to Meet the Jurisdictional Requirements of the Act by Failing to File Her Action Within 180 Days After the Alleged Unlawful Employment Practice Occurred.

Appellant proposes a construction of the statute which is totally untenable. In essence she argues that:

1. Because the alleged unlawful acts constitute a continuing violation there is no limitation on filing a civil action, and
2. Even if there is such a limitation, it commences and runs for 30 days following notification by the Commission there has been a failure of conciliation, and
3. That in either case, any time a Respondent before the Commission follows the statutory scheme for conciliation, he is estopped from thereafter raising the defense that the action is barred by the provisions of 42 U.S.C. Section 2000(e)-5.

It is difficult to imagine an act of an employer which allegedly is violative of the Act which does not have a continuing *effect* upon the claimant. That the legislature was aware of this is immediately apparent upon a reading of Section 2000(g) of the Act, wherein the Court is authorized to award reinstatement and back pay where appropriate.

To hold that an alleged single act of discrimination is a continuing violation is to completely destroy the statutory scheme for expeditious processing of charges

of discrimination. The E.E.O.C. agrees and has issued a bulletin defining isolated and continuing violations.[1]

Section 2000(e)-5 of the Act clearly sets forth a maximum time period of 180 days from the date of the alleged act within which to file a civil action. That Congress did not intend the date of notification by the Commission as the commencement of the limitation period is clearly demonstrated by the language of that Section which reads,

> "Upon request, the Court may, in its discretion, stay further proceedings for not more than 60 days pending . . . the efforts of the Commission to obtain voluntary compliance".

In other words, it is plain that Congress foresaw that claimants might be required, by the running of the period for limitation of actions, to file their action while efforts at compliance were still being made by the parties. It is not a novel concept to suggest that plaintiffs file an action to preserve their rights by stopping the running of the statute.

Any suggestion that the proper interpretation of the statute works a hardship on claimants may be answered by a counter-suggestion that the Commission, through its posters, notices and regulations, notify em-

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[1]"For purposes of jurisdiction, a distinction is made between isolated and continuing violations. An isolated violation is one which is completed when it has occurred. Examples of such violation are refusals to hire, refusals to promote, discharges and other acts of a noncontinuing nature. If such charges are to be brought to the Commission's attention, charges must be filed within the statutory time period. Continuing violations are those which are recommitted each day, such as the maintenance of discriminatory seniority systems, pay scales, or segregated restrooms or other facilities. In such cases, charges may be filed with the Commission at any time." *The First Annual Report, Equal Employment Opportunity Commission,* June 30, 1966, pp. 49-50.

ployees and prospective employees that regardless of the status of a claim before the Commission, civil action must be commenced within 180 days from the alleged act of discrimination.

Appellee is unable to locate, in the record on appeal, any allegation upon which a finding of equitable estoppel might be based, other than the allegation that

> ". . . The Equal Opportunity Employment Commission thereafter sought to secure compliance from the defendant corporation herein unsuccessfully" [Clk. Tr. p. 6, lines 6-8].

Appellee agrees that the keystone of the enforcement provisions of the Act is the voluntary compliance procedure. However, if it is true, as Appellant suggests, that by discussing compliance with the Commission a respondent is *ipso facto* estopped thereafter from raising the defense that the applicable limitation period has run, then one can reasonably expect that no respondent will ever confer with the Commission regarding conciliation. To agree with Appellant's construction would destroy the purpose of the Act by placing an unconscionable price on conciliation, and constitute an egregious disregard for the plain wording of the statute. Section 2000(a) specifically prohibits use of anything said or done during conciliation proceedings as evidence in any subsequent proceeding.

Perhaps the strongest argument against Appellant's position is made by Appellant in her brief. On page 15 of her Opening Brief, she states:

> "The regulation preserves the right to insist that if a suit is brought that it be filed within 90 days since either party may exercise his absolute right to request the Commission to send notification after 60 days."

Thus, Appellant concedes that under no theory of construction does the limitation period commence with the sending of notification by the Commission. This Court then must decide whether the running starts with either (1) the occurrence of the allegedly discriminatory act, or (2) with the filing of the charge with the Commission. While urging this Court to adopt the former construction, a finding that the latter is proper still requires affirmance of the order below.

Assuming that Appellant filed her charge within 90 days of the occurrence of the alleged discriminatory act, on or about September 14, 1966, since the instant action was not filed until July 6, 1967, under either theory Appellant's action is barred.

Analysis of Applicable Cases.

The only case cited in Appellant's brief, or the brief of the E.E.O.C., as *Amicus Curiae,* which is in point, is the case of *Mondy v. Crown Zellerbach Corporation et al.,* 271 F. Supp. 258. However, it should be pointed out that the *Mondy* case was decided July 26, 1967, some five months before the Commission amended its regulations, in a manner and with the effect discussed below.

On January 1, 1967, the Commission amended its regulations by publishing Section 1601.25a and b. In essence, the new regulation was designed to and does cure the very dilemma of which Appellant herein complains so bitterly.

If we assume, *pro arguendo,* that the statutory prerequisites for the filing of a civil action are filing a charge and receipt of notice, then prior to the amendment of the regulations the teachings of *Mondy* apply,

for the claimant was clearly at the mercy of the Commission, for without notice, there could be no right to file an action.

Section 1601.25b clearly disposes of this problem. A claimant, who has filed a charge in a timely manner, and who has had no notice from the Commission for 60 days, is clearly advised that in order to preserve the right to bring a civil action, must request and will receive notification from the Commission.

It is also important to recognize that the Commission itself preserves and recognizes the true statutory scheme of limiting civil actions under the Act. It can hardly be a coincidence that under the amended regulations a claimant can demand and receive notice after *60 days* after filing of the charge. It seems apparent that the Commission selected this period so that a claimant could file his action within the 180 day statutory time limit.

Appellee submits that the regulations promulgated by the Commission carry out Congressional intent. As it stands, a fair reading of the Act and the regulations leads to the inescapable conclusion that:

1. A claimant must file the charge with the Commission within 90 days of the alleged unlawful act,
2. The Commission may send notice within 60 days thereafter, or
3. Either claimant or respondent may demand notice after 60 days following filing of the charge, and the Commission shall *promptly* issue such notice, and
4. If civil action be brought it must be filed within 30 days after receipt of such notice, but in no event later than 180 days after the occurrence of the claimed unlawful act.

It further appears from a reading of the appendix to the brief Amicus Curiae that the charge was filed more than 90 days after the date of the alleged unlawful act (Amicus Curiae brief—Appendix 1). Subsection (d) of 42 U.S.C. 2000 makes the filing within 90 days mandatory. The complaint alleges the unlawful act to have occurred in April, 1966. The charge was filed September 14, 1966. Assuming that the alleged unlawful act occurred on the last day of April, Appellant waited 137 days to file her charge.

The charge was untimely on its face, and should have been dismissed by the Commission. This Court has not been asked to read the 90 day limitation for filing a charge with the Commission out of the statute.[2]

Appellant also concurs that timely filing of the charge is jurisdictional.

> "Appellant timely filed her charge with the Commission, she awaited its notification that conciliation has failed, then she filed her action within 30 days thereafter. These are the only prerequisites under 42 U.S.C. Section 2000(e)-5 to invoke the jurisdiction of the Federal District Court" (Appellant's Op. Br. p. 6, lines 1-6).

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[2]"A Charge must be filed with the Commission within 90 days after the alleged unlawful employment practice has occurred . . . The Commission will not entertain charges not filed within such periods." *First Annual Report, Equal Employment Opportunities Commission,* June 30, 1966, p. 49.

Conclusion.

The Order Dismissing the Complaint Without Leave To Amend should be sustained, and Appellee awarded costs of suit together with reasonable attorneys' fees.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER W. IRWIN